

U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: DEC 21 2005

IN RE:

Petitioner:
Beneficiary: [REDACTED]

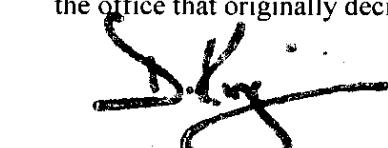
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is, according to the Form ETA-750A and the petition, a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. As will be discussed in more detail below, the petitioner has not established that the tax returns and Forms W-2 relate to the petitioner. Rather, they appear to relate to a company with the same name established two years after the petitioner was established. Thus, the record lacks evidence that the petitioner is an active company authorized to operate in the location listed on the ETA-750A.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2003. The proffered wage as stated on the Form ETA 750 is \$91,000, or \$43.75 per hour. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner in Tennessee as of May 2002, although he lists a Texas address.

On the petition, the petitioner claimed to have an IRS Tax number (FEIN) of [REDACTED] a Chicago address at which the petitioner would work, an establishment date in 1997, a gross annual income of \$342,847, no net income and six employees. In support of the petition, the petitioner submitted two pay statements for the beneficiary reflecting hourly wages of \$24.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 16, 2004, the director requested additional evidence pertinent to that ability.

In response, the petitioner submitted Form 1120 corporate tax returns for the petitioner for the years 2001 and 2002. The returns list a Tennessee address, the FEIN [REDACTED] incorporation date in 1999 and the principal business activity as "job placement." The petitioner further submitted the beneficiary's Form W-2 Wage and Tax statement for 2003 reflecting wages of \$29,167.23 and 2003 and 2004 pay stubs. The

petitioner also submitted January 2004 bank statements for the petitioner listing a Florida P.O. Box and 2003 bank statements for the petitioner listing a Tennessee address.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 3, 2004, denied the petition. On page 2, the director characterizes the petitioner as a “software and consulting business” and lists the priority date as “April 25, 2003.” On page 3, the director provides the correct wages listed on the 2003 Form W-2. On the same page, the director asserts that the “latest tax return submitted” was for 2003, but lists the information from the most recent return actually submitted, 2002. In his conclusion on page 4, the director lists the priority date as April 17, 2001.

On appeal, counsel asserts that the director included information from another case, referencing an incorrect priority date, type of business and the 2003 tax return, which was not submitted. As stated above, on page 2, the director correctly characterizes the petitioner’s purported business. It is clear that the director’s reference to a “2003” tax return was a typographical error, as the director then listed the information contained on the petitioner’s 2002 tax return. Finally, while the director listed the priority date incorrectly in the conclusion, the director listed it correctly on page 2 and does not appear to have inquired into the petitioner’s ability to pay prior to 2003.

The petitioner submits its 2003 Form 1065, U.S. Return of Partnership Income, with the following information:

Net income	\$63,424
Current Assets	\$103,142
Current Liabilities	\$38,455
Net current assets	\$64,687

As with the 2001 and 2002 returns submitted previously, the 2003 return lists a Tennessee address, the FEIN [REDACTED] an incorporation date in 1999 and the principal business activity “job placement.”

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any year. Rather, it has established that a company established two years after it was established, with a different FEIN and a different address than the one listed on both the Form ETA-750 and the petition, paid the beneficiary \$29,167.20 in 2003,¹ \$61,832.80 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well

¹ On the beneficiary’s nonimmigrant petition, receipt number SRC-02-170-54925, the petitioner promised a wage of over \$44,000, raising the question as to whether the petitioner breached a contractual obligation to the beneficiary. We note the approval of this nonimmigrant visa petition was subsequently revoked.

established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that *it* paid any wages to the beneficiary during any year. The petitioner appears to have submitted tax returns relating to a company with the same name that was established two years later with a different FEIN. These documents do not establish the *petitioner's* ability to pay the proffered wage. Even if the company named on the tax returns is a related company, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Finally, the petitioner makes no assertion that the company by the same name established two years later with a different FEIN is a successor-in-interest to the entity listed on the Form ETA-750 or the petition. A successor-in-interest must meet have assumed all of the rights, duties, and obligations of the predecessor company to retain the priority date obtained by the predecessor's Form ETA-750. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2003 or subsequently during 2004. Therefore, the petitioner has not established that it had the

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

continuing ability to pay the proffered wage beginning on the priority date. In fact, the record lacks evidence that the petitioner is an active business currently authorized to operate in Chicago, or anywhere else.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.